

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM M. SCHMIDT and U.S. POSTAL SERVICE,
POST OFFICE, Santa Ana, CA

*Docket No. 03-1280; Submitted on the Record;
Issued July 28, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's July 10, 2002 request for reconsideration as untimely.

On August 18, 1993 appellant, then a 60-year-old letter carrier, filed an occupational disease claim alleging that his bilateral heel spurs and plantar fasciitis were a result of his federal employment. The Office accepted his claim for bilateral tarsal tunnel syndrome, bilateral plantar fasciitis, sural nerve entrapment and decompression surgery. The medical evidence substantiated periods of temporary total disability from November 28, 1992 through March 15, 1998. Appellant returned to full-time modified duty on March 16, 1998.

In a decision dated January 7, 1999, the Office denied appellant's claim for wage loss for the period beginning July 15, 1998. The Office found that the medical evidence of file was insufficient to establish the relationship between the claimed disability and the accepted medical condition because there were no objective findings of disability that would establish a material worsening of his condition, thereby precluding him from continuing to work modified duty.

In a decision dated May 17, 2000, the Office reviewed the merits of appellant's claim and denied modification of its January 7, 1999 decision. The Office found that the medical evidence submitted failed to establish that appellant was totally disabled for work.

In a decision dated July 11, 2001, the Office again reviewed the merits of appellant's claim and denied modification of its prior decisions. The Office noted that appellant returned to limited duty from March to August 1998. The evidence established that this duty was consistent with his medical restrictions, as his treating physician concurred with the job offer prior to acceptance. The Office found that appellant provided no reliable, probative and substantial evidence to support a recurrence of total disability and to show that he could not perform the modified position. Appellant also provided no corroborating evidence to substantiate his allegation that he was consistently required to case mail for more than an hour at a time and for more than two hours per day and to lift trays of mail weighing up to 30 pounds. An attached

statement of appeal rights advised that any request for reconsideration be made within one year of the date of the decision and be sent to the district Office at the address appearing on the accompanying letter.

In a letter dated July 10, 2002, appellant, through his attorney, requested reconsideration and offered 11 pages of argument, the bulk of which concerned job suitability issues from 1999. Appellant's attorney attached a certificate of mailing, also dated July 10, 2002, certifying that the request for reconsideration was sent first-class, certified, postage prepaid on that date to the Office's centralized mail facility in London, Kentucky.

In a September 30, 2002 letter to appellant's senator, the Office explained that appellant filed a request for reconsideration on July 10, 2002 but the request was misidentified, resulting in a delay in processing.

In a decision dated November 26, 2002, the Office noted that appellant's request for reconsideration was dated July 10, 2002 but was received on July 16, 2002. The Office advised: "According to 20 C.F.R. § 10.607(a), we will not review a decision unless the request is filed within one year of that decision." Nonetheless, the Office considered appellant's request under section 10.607(b) (consideration of untimely applications) to determine whether he presented clear evidence that the Office's last merit decision was incorrect. After describing clear evidence of error, the Office found that appellant did not present it. The Office further found as follows:

"Therefore your request for reconsideration is denied because it was not received within the one-year limit. The basis for this decision is that the arguments, presented in your letter of July 10, 2002, are repetitive of evidence previously considered by the [Office] in its decision of July 11, 2001. The arguments put forward in your request for reconsideration are deemed repetitive in nature and insufficient for review."

On April 15, 2003 appellant's attorney filed an appeal with the Board seeking review of the Office's November 26, 2002 decision. The attorney submitted a brief on the issue of timeliness and offered a certified mail receipt as proof.¹

The Board finds that this case is not in posture for decision. Appellant's July 10, 2002 request for reconsideration was timely filed.

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."²

¹ The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to review the new evidence submitted on appeal.

² 20 C.F.R. § 10.605 (1999).

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificates of service and affidavits may be used to establish the mailing date.³

Because the Office did not make the envelope a part of the record, timeliness cannot be determined by the postmark of appellant's request. The record, nonetheless, contains sufficient other evidence to establish the date of mailing. The date of the letter itself, July 10, 2002, may be used to establish the date of mailing, but the evidence also includes a certificate of service from appellant's attorney, who certified that the request for reconsideration was properly mailed on July 10, 2002. The Office's receipt of the request on July 16, 2002 is immaterial, and the Office's use of that date to determine the timeliness of appellant's request was in error.

The Board will set aside the Office's November 26, 2002 decision and remand the case for proper consideration of appellant's timely request for reconsideration and for a final decision on whether he is entitled to a merit review of his claim under the appropriate standard of review.

The November 26, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
July 28, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

³ *Id.* at § 10.607(a).